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Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL & IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF NATIONAL SURETY COMPANY, APPELLEE.

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BAIRD-WARD—NASHVILLE

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May it Please the Court:

Since this case was argued here for appellant in January the Tennessee Supreme Court has *supplemented its opinion* to show the following:

(a) That appellant's assignment of error and accompanying brief in that court did not raise any federal question; that the case was heard and the court was divided and ordered a reargument as to "the constitutionality, construction and applicability" of Chapter 80 of the Acts of 1929; and that prior to the reargument appellant "filed a second brief . . . raising the constitutional questions" (Sup. R., 13); and

(b) That the Tennessee Court in its references to the constitution "intended to express the opinion that the said Act so construed did not impair the obligation of contracts

in violation of Section 20 of Article I of the Constitution of Tennessee and the contract clause of Section 10 of Article I of the Constitution of the United States . . ." (Sup. R., 10).

I.

Appellant recovered in the lower court on a statutory bond and is here denying the applicability of the statute. In *Daniels* v. *Tearney*, 102 U. S., 415, this court said that a statutory bond could not be valid and the statute invalid:

> "The bond as a statutory instrument cannot have more validity than the statute which prescribed it . . . *To hold the bond valid as a statutory bond and the statute void would be an inversion of reason.*" (Italics ours.)

And this court went on to say that even where the statute was void it must nevertheless be treated as valid as to persons who had invoked it and taken advantage of its provisions. The statute in that case provided for postponing the enforcement of executions upon giving a certain statutory bond. The statute was in aid of the Virginia Ordinance of Secession and was void, but the bondsmen had invoked the statute and received its benefits, and this court said that they could not be heard to deny the validity of the bond.

The court cited and approved earlier cases in support of the principle and quoted from *Ferguson* v. *Landram*, 5 Bush., 230, as follows:

> "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or *from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?*" (Italics ours.)

In the instant case appellant has received some $40,000 "through a statute" and now asks the aid of this court to "keep the consideration and repudiate the statute."

So in *United Fuel & Gas Co.* v. *Railroad Commission of Kentucky*, 278 U. S., 300, the Gas Company denied the validity on constitutional grounds of certain powers of the State Railroad Commission, whose authority, however, the Gas Company had theretofore invoked. The court said:

> "But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellant in the present suit. *It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States.* (Italics ours.) *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S., 407, 37 S. Ct., 609, 61 L. Ed., 1229; *Electric Co.* v. *Dow*, 166 U. S., 489, 17 S. Ct., 645, 41 L. Ed., 1088; *Eustis* v. *Bolles*, 150 U. S., 361; 14 S. Ct., 131, 37 L. Ed., 1111; *Hurley* v. *Commr. of Fisheries*, 257 U. S., 223, 42 S. Ct., 83, 66 L. Ed., 206; *St. Louis Malleable Casting Co.* v. *George C. Prendergast Co.*, 260 U. S., 469, 43 S. Ct., 178, 61 L. Ed., 351.

In *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S., 407, the Parrott Company had sold its property to the Anaconda Company under a statute which allowed dissatisfied stockholders to institute a certain statutory proceeding to fix the value of their stock. The plaintiffs as stockholders instituted such a proceeding and then brought this suit, alleging that the statute deprived them of property without due process of law.. This court said:

> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other states

and of a seemingly equitable character, for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them. *Great Falls Mfg. Co.* v. *Atty. Gen.*, 124 U. S., 581, 31 L. Ed., 527, 8 Sup. Ct. Rep., 631; *Electric Co.* v. *Dow*, 166 U. S., 489, 41 L. Ed., 1088, 17 Sup. Ct. Rep., 645; *Pierce* v. *Somerset R. Co.*, 171 U. S., 641, 43 L. Ed., 316, 19 Sup. Ct. Rep., 64; *Leonard* v. *Vicksburg*, S. & P. R. Co., 198 U. S., 416, 422, 49 L. Ed., 1108, 1111, 25 Sup. Ct. Rep., 750. *They cannot claim the benefit of statutes and afterwards assail their validity.* There is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim of right may be." (Italics ours.)

Other cases illustrating this principle are *Pierce Oil Corp.* v. *Phoenix Oil Refining Co.*, 259 U. S., 125, and *Booth Fisheries* v. *Industrial Commission*, 271 U. S., 208.

Accordingly, the sureties in the statutory bond involved in the instant case were liable only in the way and to the extent prescribed by the statutes. *Neither bond could be separated from its statute so as to make the bond available and at the same time rule out the statute.* This court will give consideration to the opinion of the state court but will determine for itself whether the appellant seeking its aid has suffered a constitutional wrong. And the question of whether the appellant *is entitled to invoke the constitution* is inherent in this determination.

It is fundamental, as illustrated in the above cases, that a litigant has suffered *no constitutional wrong* by the application to his case of a statute which he has invoked and availed himself of. Where a state court urges estoppel as a reason for refusing to consider a constitutional claim, this court will upon well settled principles determine for itself whether this refusal was rightful or wrongful. And

conversely, where the litigant, having invoked and recovered upon an act, has upon well settled principles suffered no constitutional wrong by reason of its application, this court will not be constrained to recognize a constitutional wrong.

Thus in *Winona, etc., R. Co.* v. *Town of Plainview*, 143 U. S., 371, this court said, at pages 393-4:

> "Although the plaintiff in error was held liable by the state court by virtue of the Act of 1881, *that did not raise a federal question because the liability was one assumed voluntarily* by the plaintiff in error." (Italics ours.)

In *City of New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S., 79, this court said that the federal question must have some foundation, and quoted from *Millingar* v. *Hartupee*, 6 Wall., 258:

> "If a right were claimed under a treaty or statute and on looking into the record it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a state court that the right claimed did not exist."

And the court went on:

> "Applying the principle of this decision to the present case we think that before we can be asked to determine whether a statute has impaired the obligation of a contract *it should appear* that there was a legal contract subject to impairment *and some ground to believe that it has been impaired.*" (Italics ours.)

Where, in the language of the Winona Case above, "the liability [arising from the statute] was one *assumed voluntarily* by the plaintiff in error"—in other words, where it appears that the plaintiff in error has sued and recovered on the statute that he is complaining of—it is submitted

that there is not, in the constitutional sense, any "ground to believe that it [the contract] has been impaired."

II.

Under the construction given the 1929 Act by the Supreme Court of Tennessee—a construction that does not involve any federal question—*there are no circumstances under which any litigant can recover on both statutory bonds. That is the law of Tennessee.*

If appellant, after recovering on the 1929 Act, was entitled at this late stage to repudiate that act, it could not do so without restoring the benefits it had received from the act, which it has not offered to do.

If appellant's complaint is sound, it could not be deprived by the Act of 1929 from recovering on the bond given under the Act of 1917; but by the same argument it could not recover on the 1929 bond.

The constitution cannot be made a cloak for fraud. *There is no federal question involved in the ruling by the Tennessee court that the two bonds are alternative.* It is respectively submitted that that ruling must be given effect, and that if appellant has recovered on the wrong bond it cannot both retain the benefits and recover on the other bond. That is a principle of common honesty from which appellant is not protected by the constitution.

III.

The remedy of the second bond was not available to appellant when it entered into its contract. It nevertheless elected to recover on that bond and to receive the benefits of it. *In affirming that recovery the Supreme Court of Tennessee merely affirmed what appellant had elected to do,*

and at the same time the court said that the later act merely substituted a new and adequate remedy.

The case of *Abie State Bank* v. *Bryan* (Weaver), 282 U. S., 765, is somewhat analogous. There had been a Bank Guaranty Law of Nebraska under the terms of which the banks operating in the state were assessed to make up a guaranty fund to protect depositors. This guaranty stood back of the obligation of the banks to their depositors. Later the guaranty law was repealed. The depositors then made the claim that they had acquired contractual rights in the fund which could not be impaired by the repealing act. This court said:

> "The Bank Guaranty Law provided for a fund to be raised by assessments upon all the state banks, and while this was regarded as an important safeguard for all depositors, it was but a police regulation, the sanction of which lay in the constitutional power of the state and not in contract. See *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S., 379, 385-7, 24 S. Ct., 107, 48 L. Ed., 229. And this is the view that has been taken by state courts which have had occasion to consider this question in connection with legislation by which relief has been sought from the difficulties encountered in the continued operation of bank guaranty plans." (Citing cases from state courts.)

Respectfully submitted,

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